

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE

Assigned on Briefs September 22, 2009

STATE OF TENNESSEE v. EUGENE THOMAS DOSS

**Direct Appeal from the Circuit Court for Franklin County
No. 18131 Thomas W. Graham, Judge**

No. M2009-00381-CCA-R3-CD - Filed February 19, 2010

The Defendant, Eugene Thomas Doss, was convicted of driving under the influence (“DUI”), third offense. On appeal, the Defendant contends that the evidence is insufficient to support his convictions and that the sentence imposed by the trial court is excessive. The Defendant, however, did not timely file a notice of appeal or seek waiver of the timely filing of a notice of appeal. Tenn. R. App. P. 4(a). Therefore, we dismiss the appeal.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court Affirmed

ROBERT W. WEDEMEYER, J., delivered the opinion of the Court, in which JAMES CURWOOD WITT, JR., and D. KELLY THOMAS, JR., JJ., joined.

Robert S. Peters, Winchester, Tennessee, for the appellant, Eugene Thomas Doss.

Robert E. Cooper, Jr., Attorney General and Reporter; Michael E. Moore, Solicitor General; Clark B. Thornton, Assistant Attorney General; J. Michael Taylor, District Attorney General; Steven M. Blount, Assistant Attorney General, for the appellee, State of Tennessee.

OPINION

I. Facts

This case arises from the Defendant’s February 5, 2008, DUI arrest. The Defendant was indicted for DUI, third offense DUI, violation of the implied consent law, and reckless driving. A Franklin County jury convicted the Defendant of DUI. The Defendant waived a jury determination on the issue of his guilt of third offense DUI, agreeing to submit the charge to the trial court. The trial court convicted the Defendant of third offense DUI and sentenced the Defendant on October 14, 2008, to 180 days of incarceration.

The Defendant timely filed a motion for new trial, for judgment of acquittal, and for reduction of the sentence, which the trial court denied on December 9, 2008. On January 13, 2009, the trial court reset the motion for a new trial and entered an amended order on January 27, 2009, stating as follows:

Upon motion of the defendant, through his attorney, to allow an amended order overruling motion for new trial to be entered which will supplant the order overruling the motion for new trial which was entered in this cause on December 9, 2008, and with the agreement and concurrence of the State, and it appearing to the court that there was a justifiable and excusable reason for the defendant, through his attorney, not to file a notice of appeal within the time provided by law and that the order of December 9, 2008, should be set aside. It is therefore ORDERED that the order overruling the motion for new trial be amended to reflect the date of the filing of this amended order and that the order of December 9, 2008, be set aside.

The Defendant filed a notice of appeal on February 6, 2009.

II. Analysis

On appeal, the Defendant argues that there is insufficient evidence to sustain his conviction for driving under the influence of an intoxicant. The Defendant further argues that the trial court's sentence of 180 days of incarceration is excessive. The State responds that the notice of appeal is untimely and that the amended order does not cure this issue. As such, the State argues, this Court should dismiss the Defendant's appeal.

Ordinarily, a trial court's judgment becomes final thirty days after the entry of the judgment, unless a notice of appeal or post-trial motion is filed. Tenn. R. App. P.4(a); *See State v. Boyd*, 51 S.W.3d 206, 211 (Tenn. Crim. App. 2000). After a judgment becomes final, the trial court loses jurisdiction over the matter. *Id.* An appeal as of right is initiated by the filing of a notice of appeal within thirty days of the entry of the judgment. Tenn. R. App. P. 3(e) and 4(a). It is the defendant's responsibility to properly perfect his appeal or to demonstrate that the "interests of justice" merit waiver of an untimely filed notice of appeal. Tenn. R. App. P. 4(a).

It is clear that the filing of the notice of appeal herein is untimely. Appellant did not file the notice of appeal until almost two months after the December 9, 2008, order denying the Defendant's motion for new trial. The trial court's January 27, 2009, amended order is a nullity, because the trial court lost jurisdiction over the matter thirty days after the entry of the December 9, 2008 order. *See Boyd*, 51 S.W.3d at 211; *see also* Tenn. R. App. P. 4(a).

As such, review of the Defendant's appeal is available only upon his showing that a waiver of a timely notice of appeal is appropriate. Tenn. R. App. P. 4(a). The Defendant, however, has not requested a waiver of the timely filing requirement in the "interests of justice," or explained to this Court why the notice of appeal was late and why he should be excused from the timely filing requirement. Under these circumstances, this appeal should be dismissed as untimely.

III. Conclusion

Because the notice of appeal in this case is untimely and because the appellant has not sought a waiver of the timely filing requirement in the "interests of justice" under Tennessee Rule of Appellate Procedure 4(a), this appeal is dismissed.

ROBERT W. WEDEMEYER, JUDGE